3. The custody is awarded to the mother. In such cases, on petition of the divorced mother entitled to custody of her child, courts have generally given orders against the father for future support of the child, either by virtue of statute,[13] or of the original jurisdiction of courts of chancery over the persons and estates of infants.[14] But in California, the assumption by Mr. Justice Temple [15] of the literal meaning of the Civil Code section was made the basis of a later decision [16] in which future support was ordered, but compensation for past support denied, and of another,[17] refusing a physician's claim against the father for services to a child in the custody of her mother. Here, however, a settlement agreement had been made at the time of the divorce decree.

The principal case seems to be the first in which real injustice was done. Under the code section, as it has been construed, the case is right. But why should the section, the only purpose of which manifestly is to insure the welfare of the child, ever have been thus construed? The only ground upon which the guardianship proceeding in the McMullin case could have been sustained is that the father was guilty of some misconduct. A construction which allows one by reason of his own wrong doing to shift a duty from his shoulders is somewhat startling. M. O.

Pleading—Should Fraud be Pleaded in the Complaint, or is Evidence of Fraud Admissible Under the Replication Implied by Section 462 of the Code of Civil Procedure of California.—The days when a declaration was held bad because the pleader used the abbreviation A. D. have passed away,—let us hope never more to return. But occasionally points of pleading still arise which must command serious consideration. One of those questions is that of pleading fraud,—when must you, and when need you not, plead it. The practice on this subject can hardly be said to be well settled when such able judges as Mr. Justice Henshaw and Mr. Justice Shaw express diametrically opposite views upon the question in two cases decided within a week of each other. In the case of Estate of Yoell,[1] in which the opinion was written by the former judge, a wife applied for a family allowance, the representatives of the decedent set up a separation agreement which would destroy her right to an allowance, and the wife sought to show that the agreement was (to use the striking language of the gifted judge), secured by fraud "so comprehensive and apprehensive in its perfidiousness that it would have excited the envious

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[13] Buckminster v. Buckminster (1865), 38 Vt. 248, 38 Am. Dec. 652; Erkenbrach v. Erkenbrach (1884), 96 N. Y. 456; McKay v. McKay (1899), 125 Cal. 65, 57 Pac. 677; Civil Code of Cal., Sec. 139.

[14] Cowls v. Cowls (1846), 8 Ill. 435; 44 Am. Dec. 708.

[15] Ex parte Miller (1895), 109 Cal. 643, 42 Pac. 428.

[16] McKay v. McKay (1899), 125 Cal. 65, 57 Pac. 677.

[17] Selfridge v. Paxton (1905), 145 Cal. 713, 79 Pac. 425.

[1] Estate of Yoell, decided Jan. 20, 1913, 45 Cal. Dec. 125.

admiration of Machiavelli." Not having pleaded the fraud in her petition, however, the court thought that she should not be permitted to show it under the implied replication given her by Section 462 of the Code of Civil Procedure, by virtue of which any matter may be given in evidence by the plaintiff controverting the new matter of defense set up in the answer. Thus the world lost a gem of picturesque literature.

In the case in which Mr. Justice Shaw [1] took the opposite view with regard to pleading fraud, the plaintiff sued to "quiet title," the defendant set up title under a trust deed, and the plaintiff offered evidence to show fraud in the sale by the trustee. The court held that the evidence of fraud was properly received, though it held that the facts proved did not establish the plaintiff's claim.[2] Both Justice Henshaw and Justice Shaw were indulging in dicta.

The case of Burris v. Adams,[3] upon which Justice Henshaw's opinion ultimately rests for authority, has, we confess, always had for us a queer look, and its queerness seems also to have impressed some of our judges.[4] But we believe that its exotic appearance is rather in the mode of expression than in the result. A speculative plaintiff bought an heir's interest for the purpose of suing to set aside a fraudulent sale made by the administrator. Mr. Justice McFarland said: "He bought, or had transferred to him, a lawsuit. . . . He knew from the start that the respondent had a perfect legal title, which he could overthrow only by proving her guilty of a certain fraud, and he did not aver fraud even in general terms." It seems hardly a satisfactory test to rest a rule of pleading upon a psychological investigation as to what a party did or did not know. The limits within which the parties should move in their order and method of proof ought to be easily settled by a rule of thumb which lawyers can apply. Under such a test as that suggested in the Burris case, the cynical remark of a fourteenth century judge becomes true,—"law is what the justices will (Volonte des justices.)" [5]

But the knowledge test, notwithstanding its unsatisfactory character, seems to have guided other judges in their treatment of this question.

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[2] Jose Realty Company v. Pavlicevich, decided January 27, 1913, 45 Cal. Dec. 160.

[3] Burris v. Adams (1892), 96 Cal. 664, 31 Pac. 565. See also Burris v. Kennedy (1895), 108 Cal. 331, 343, 41 Pac. 458; Estate of Vance (1904), 141 Cal. 624, 75 Pac. 323.

[4] See remarks of Chipman, C., in Moore v. Copp (1897), 119 Cal. 429, 433, 51 Pac. 630, and of Angellotti, J., in Wendling Lumber Co. v. Glenwood Lumber Co. (1908), 153 Cal. 411, 416, 95 Pac. 1029.

[5] Quoted by Sir Frederick Pollock, in the Genius of the Common Law, 12 Columbia Law Review 190 (The Carpentier Lectures, 1911), reprinted in book form, Columbia University Press, New York, 1912. The whole quotation from the Year Book of 18-19 Edward III (1345) is interesting. "Thorpe, Counsel, (arguing) . . . otherwise we will not know what the law is. Hillary, J., (interrupting) The will of judges. Stonore, J., Law is reason."

Thus, in the case of Moore v. Copp,[6] cited by Justice Shaw,[1] a case which it is respectfully submitted cannot be reconciled with Burris v. Adams, in spite of its statement that "Burris v. Adams was peculiar in its facts," Commissioner Chipman says: "Plaintiff could not know when she filed her complaint, that defendant would answer, nor that, if he did, he would claim under the instrument in question." Of course, it might be said that Burris could not, either.

So far is it goes, Mr. Justice Angellotti's discussion in Wendling Lumber Company v. Glenwood Lumber Company,[7] does set up a standard which will enable litigants and their counsel to proceed with certainty. If the fraud renders the transaction void, then it need not be pleaded. But the attempt, in the same case, to lay down the rule that where the plaintiff's cause of action is based on fraud he must plead it, and when it is not, he need not do so, leaves us in about the same uncertainty as Justice McFarland's test. Tried by this test, we should think the Pavlicevich case was one where fraud should have been pleaded by the plaintiff in his complaint.

The truth is the question is one of the many unsettled ones arising out of the amalgamation of the procedure in law and that in equity. Under the system of divided jurisdictions there could be little doubt as to the proper method of pleading. The plaintiff, in a case like Pavlicevich's, would surely lose at law. His only remedy would lie in equity to compel the cancellation of the instrument claimed to be fraudulent, or to enjoin its enforcement, and he must there plead his fraud as an affirmative cause of action. Only where the instrument was void, as in the Wendling case, could plaintiff succeed at law. But the code permits equitable defenses to be pleaded in legal actions. What is an equitable defense? Must not equitable remedies be sought substantially in the same way under the code as before the code?[8] Had there been in the code a general statement such as is found in the English Judicature Acts that where the rule in equity conflicts with the rule at law, the former controls, there could be little doubt that the question would be answered in accordance with views expressed in the Yoell case. Yet upon the precise question under discussion, the weight of authority in California probably is in accord with Justice Shaw's views. At the time when the replication was a pleading (why was it abolished?),[9] the Supreme Court seems to have taken the position now followed in the Pavlicevich case.[10]

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[6] Moore v. Copp (1897), 119 Cal. 429, 51 Pac. 630.

[7] Wendling Lumber Co. v. Glenwood Lumber Co. (1908), 153 Cal. 411, 95 Pac. 1029.

[8] A notable division of opinion exists between the two text writers who have most carefully studied the American Reformed Procedure-Professor Pomeroy, Code Remedies, Section 91 argues that the equitable defense may be pleaded without asking equitable relief, while Judge Bliss, Code Pleading, Sections 348 et seq. (see particularly, note to Section 351), argues the opposite view.

[9] Under the Practice Act, Sec. 65, until its amendment in 1865 (Statutes 1865-6, p. 703), the replication was one of the pleadings in California.

[10] Canfield v. Tobias (1863), 21 Cal. 349.

In view of the division of opinion and the diversity of theories, it might be very desirable to reconsider the doctrine of Moore v. Copp. The rule of stare decisis—if we can consider that as settled upon which the court seems evenly divided—should have small weight in a matter of practice, and the principle that fraud need not be pleaded in the complaint, though the ultimate relief that the plaintiff may get is, in effect, the cancellation of a written instrument upon the ground of fraud, leads to inharmonies and inconveniences that should be avoided. Some of the results of the doctrine approved in the Pavlicevich case may be noted. First, the doctrine that the fraud is matter for the replication is not harmonious with the doctrine, elsewhere enunciated, that the legal title prevails in the action to "quiet title." The defendant in the Pavlicevich case plainly had the legal title.[11] Second, the plaintiff is enabled to demand a trial by jury, if he chooses, in a case where the issues are really equitable.[12] He may sue in ejectment upon a constructive eviction, and withhold his attack on the defendant's muniments of title until the replication. Third, the plaintiff is enabled to prove his case on rebuttal, with the advantage of cross examining the defendant as a hostile witness, and of impeaching him as such. Fourth, under the implied replication, it is possible that the defendant is not apprised of the claim of fraud until the trial, when he may have lost his evidence upon the subject,—evidence that might have been preserved had he known the real nature of plaintiff's case. The possible surprise is also a matter that should be considered, though doubtless the trial court could obviate this difficulty by proper continuances.

O. K. M.

Practice—Motion for Change of Place of Trial—Necessity of Notice of Motion.—It would scarcely seem to require judicial discussion to determine the meaning of statutes providing that notices of motions must be given in writing, stating the time when and the place where they are to be made and providing that, under certain circumstances, the place of trial may be changed on motion. Yet the Supreme Court [1] has been obliged to overrule a decision of the District Court of Appeal in which two judges held that the absence of a written notice of motion for change of place of trial was immaterial, and the other one, that the opposite party had waived his right to object because he appeared for the very purpose of urging that proper notice was not given,

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[11] County of Los Angeles v. Hannon (1910), 159 Cal. 37, 48, 112 Pac. 878, and cases cited.

[12] Angus v. Craven (1901), 132 Cal. 691, 64 Pac. 1091; McNeil v. Morgan (1910), 157 Cal. 373, 108 Pac. 69; Donahue v. Meister (1891), 88 Cal. 121, 25 Pac. 1096; Hughes v. Dunlap (1891), 91 Cal. 385, 27 Pac. 642.

[1] Bohn v. Bohn (Jan. 18, 1913), 45 Cal. Dec. 107.